KHOO KAH HOCK

v.

LIM SOON SIANG

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL APPEAL NO. 64/81]
30 JULY 1983

LANDLORD AND TENANT: *Delivery of vacant possession - Notice to quit - Whether valid - Relevant period of required possession.*

The defendant appeals against an order to vacate and deliver vacant possession on the grounds that the tenancy had not been determined by not less than one year's notice to quit and that the plaintiff had not established that the tenancy was determined and that the notice to quit was valid. Further the defendant appealed on the ground that the learned President had misdirected himself in law when he failed to consider the onus on the plaintiff to prove that he reasonably required the said premises at the time of hearing and not in the future. The plaintiff had given evidence during the trial to the effect that he was still employed as a special branch officer and that he only required possession of the premises upon retirement.

Held:

[1] The plaintiff had not shown that he had given a valid notice to quit as he had not called evidence to show the date when the notice actually expired was in fact the end of a period of tenancy.

[2] At the time of the hearing of the suit the plaintiff did not reasonably require the said premises for occupation by himself and his family, pursuant to s. 16 of the Control of Rent Act 1966.

[Appeal allowed with costs.]

Cases referred to:

Lemon v. Lardeur [1946] 1 KB 613
P. Phipps and Company (Northampton and Towcester Breweries) Limited v. Rogers [1925] 1 KB 14
Addis v. Burrows [1948] 1 All ER 177; [1948] 1 KB 444
Allam & Co. Ltd. v. Europa Poster Services Ltd. [1968] 1 All ER 826
Ang Bock Seng v. Murugiah Valamball [1970] 1 MLJ 130
Veeriah v. Mal Singh [1969] 2 MLJ 93
Perak Hauliers Limited v. The Cycle & Carriage Co. Ltd. [1962] MLJ 7
Sims v. Wilson [1946] 2 All ER 261

Legislation referred to:

Control of Rent Act 1966, s. 16(1)(f)
Evidence Act 1950, ss. 102, 106
Interpretation Act 1967, s. 12

Other sources referred to:

Woodfall's Law of Landlord and Tenant Vol. 1, 28th Edn., p. 905
Megarry on the Rent Acts, 10th Edn., p. 294

For the appellant - Lim Ewe Hock (Khaw Ewe Seng with him); M/s. Lim Ewe Hock & Co. M/s. Khaw Ewe Seng & Co.
For the respondent - S. C. Loh (Lim Chin Sun with him); M/s. Joseph Tan & Tang

JUDGMENT

Gunn Chit Tuan J:

Lim Soon Siang, the owner and landlord, was the plaintiff in Penang Sessions Court Civil Action No. S (C) 653/79 in which he claimed possession of premises No. 224-F Burmah Road, Penang (hereinafter referred to as "the said premises") under s. 16(1)(f) of the Control of Rent Act 1966. On 18 September 1981 the learned President of the Sessions Court, Penang, ordered Khoo Kah Hock, the defendant who is the tenant, to vacate and deliver vacant possession of the said premises. The defendant appealed to the High Court against that order and, after service of the appeal records on him on 20 December 1982, lodged a petition setting out seven grounds of appeal. However, when the appeal was argued before me on 29 July 1983, Mr. Lim Ewe Hock, Senior Counsel for the defendant as the appellant, stated that there were in fact the following two substantive points of appeal:

1. Has the tenancy been determined by not less than one year's notice to quit?

It was the submission of Mr. Lim that the burden of proving that the tenancy has been so determined and that the notice to quit was valid was on the plaintiff. He referred the Court to the following passages in the judgments of Morton LJ and Somervell LJ respectively in *Lemon v. Lardeur* [1946] 1 KB 613 at page 616, 618-19:

> This Court does not know whether the notice to quit, which was given in the present case, did or did not expire at the end of a four weeks period, because the evidence does not show when any period of four weeks began or ended. It was suggested in argument that it was for the defendant to establish that the notice did not expire at the proper date, but I do not agree with that suggestion. The plaintiff has pleaded that the defendant was her tenant; she has pleaded that the tenancy has been determined by a notice and it is for her to establish that the notice was a valid notice. I think that that view of the law is supported by the case to which I have referred in passing, *Doe d. Finlayson v. Bayley* [1831] 5 C. & P. 67. The result is that on this ground the notice to quit is invalid; and

> The first point that was taken on behalf of the defendant was that the notice to quit was invalid because it did not expire at the end of the current tenancy. I will not refer to the authorities, which have already been referred to, but I would like to say that I agree with everything that has been said about them. In this case there was no evidence as to the date in the material month or months from which this tenancy ran. As it seems to me, it was for the plaintiff (who, in her pleading, alleges that the defendant had a tenancy) to call evidence to show that tenancy had been terminated according to law. No evidence being called by her to show that the date when the notice actually expired was in fact the end of a period of the tenancy, it seems to me that she fails on this point to establish that the notice was a good one and that the tenancy which she admits exists had come to an end. Therefore, on that point she fails on the ground that she had not shown that she had given a valid notice to quit.

Mr. Lim contended that to determine the tenancy in this case by not less than one year's notice the plaintiff must prove that the notice to quit was served on the defendant. He pointed out that although the defendant had in his defence admitted that "he received a notice dated 26 September, 1977", he had made no admission as to the date he received the said notice to quit. Counsel also contended that to prove that the said notice has so determined the defendant's tenancy, the plaintiff had to prove that the said notice to quit was received by the defendant before the commencement of his month of tenancy on 1 October 1977, because if the said notice was received by the defendant after 30 September 1977, the tenancy could

not be determined on 31 October 1978 as the notice to quit would have been less than a year. Mr. Lim reiterated that for the notice to quit dated 26 September 1977 to be a clear year's notice to quit, there must be evidence that the said notice was served on or received by the defendant on or before the midnight of 30 September 1977; but there was no such evidence as the plaintiff had not bothered to lead any evidence as to the date of the commencement of the tenancy as well as to how the notice to quit was sent. The plaintiff in his evidence-in-chief merely said "my lawyer sent a notice to quit". Counsel posed the question whether the said notice was sent by post or by hand? He conceded that personal service was not necessary but added that there was no evidence on record that the said notice to quit was sent by post and, if sent by post, when it was sent. Mr. Lim then pointed out that the plaintiff could not invoke the provisions of s. 12 of the Interpretation Act 1967, on service by post, which is as follows:

> Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service -
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

because there is no written law authorising or requiring a notice to quit to be served by post. In any case, Counsel pointed out further that even if the said notice to quit was sent by post, (and there was no such evidence) it was not sent by registered post. As the plaintiff has failed to prove that the said notice to quit came into the hands of the defendant before the commencement of the year, it was Counsel's submission that the plaintiff had failed to prove that the notice to quit which required the defendant to vacate the said premises on or before 31 October 1978, in fact gave the defendant a clear year's notice.

Counsel then referred to the alternate leg in the said notice to quit which contained the words "or at the end of the expiration of one (1) year notice to you". He submitted that it was bad in law for the reason that it was meaningless, ambiguous and uncertain, and relied on the following passage in *Woodfall's Law of Landlord and Tenant* Vol. 1, 28th edition at page 905:

> A notice to quit must be clear and certain, so as to bind the party who gives it and to enable the party to whom it is given to act upon it, at the time when it is given. The notice must be ambiguous.

He submitted further that the alternate leg was meaningless because it did not indicate expiration from when? Was it from the date of the notice i.e. 26 September 1977, or from the date of receipt of the said notice? In either event, it was the contention of Counsel that it was not a clear year's notice.

Mr. Lim next referred to the English Court of Appeal case of *P. Phipps and Company (Northampton and Towcester Breweries) Limited v. Rogers* [1925] 1 KB 14. In that case the notice to quit was in these terms:

> We hereby give you notice to quit and deliver up to us ... on the earliest day your tenancy can legally be terminated by valid notice to quit given to you by us at the date of the service hereof All that," etc., naming the demised premises.

It was held by Bankes and Atkin LJJ.; Scrutton LJ dissenting, that the notice to quit was invalid, inasmuch as it placed upon the tenant the burden of resolving the questions of law (a) when his tenancy could be legally determined, and (b) what was a valid notice to quit. But here it ought to be pointed out that that case was later distinguished in the English Court of Appeal in *Addis v. Burrows* [1948] 1 All ER 177; [1948] 1 KB 444. There the premises were let from 1 January 1944 to 30 June 1945:

> for the term of one year and so on from year to year until the tenancy be determined at the end of the first or any subsequent year by one of the parties giving to the other of them six calendar months previous notice in writing.

On the face of the tenancy agreement in that case there was an ambiguity because the period from 1 January 1944, to 30 June 1945, was not a term of one year. The agreement was on a printed form and the words "from 1 January 1944, to 30 June 1945" had been typed in. On 28 June 1945, the plaintiffs, the lessors, gave the defendant notice to quit "at the expiration of the year of your tenancy which will expire next after the end of one half year from the service of this notice". The defendant did not give up possession at the due date and the plaintiff brought an action. The English Court of Appeal held, reversing Oliver J, first, that on its true construction the tenancy granted was for eighteen months certain and thereafter a yearly tenancy; secondly, the notice to quit was not invalid as being too vague [they distinguished *P. Phipps and Company (Northampton and Towcester Breweries) Limited v. Rogers]*

The most recent case on the form and construction of a notice to quit is *Allam & Co. Ltd v. Europa Poster Services Ltd* [1968] 1 All ER 826 at p. 839, in which Buckley J in the Chancery Division referred to *Phipps & Company v. Rogers* and *Addis v. Burrows* and said as follows :

> No doubt if those cases are both good law, as I must assume that they are, the question of the validity of a notice, the interpretation of which involves some question of law, must become a question of degree. There must be cases which, because of the difficulty or complexity of the case, fall within the principle of *Phipps & Co. v. Rogers.* There must be others which, notwithstanding that some question of law arises, because of the simplicity or comparative simplicity of the problem fall within *Addis v. Burrows.*

In other words, the distinction is between cases where the validity of the notice depends upon complex or difficult questions of law, in which case the notice will be invalid, and cases where the question of law is simple, in which case the notice will be valid; so that the question is one of degree.

In so far as the present case was concerned, Mr. Lim submitted that the meaning of "one year notice to you" was left uncertain in the alternate leg. He questioned whether it meant 365 days of twelve calendar months and if twelve months then according to what calendar? He stated that the Interpretation Act 1967 gives the definition of a "year" to mean "a year reckoned according to the Gregorian calendar"; but pointed out that a tenant was not supposed to have to apply that law to find out the meaning, if any, of "one year notice to you". He also submitted that the alternate leg in the notice to quit did not save it from being bad for failure by the plaintiff to prove the date of receipt of the notice by the defendant, and contended that the plaintiff had therefore failed to discharge the onus which was on him to prove that the tenancy had been determined by not less than one year's notice to

quit which was a pre-requisite under the said s. 16(1)(f) of the Control of Rent Act 1966, before the Court could even consider the question of hardship, and on that ground alone the appeal from the Sessions Court must succeed.

In his reply on this point, Mr. S.C. Loh, leading Counsel for the plaintiff as the respondent, merely submitted that the burden of proof was on the defendant to show that the notice to quit was received within such time that it gave him less than a year's notice. He referred to ss. 102 and 106 of the Evidence Act 1950 (Revised - 1971) on the burden of proof and of proving a fact especially within the knowledge of any person respectively, and contended that the defendant having admitted receipt of the notice to quit, the fact as to when the notice was received by him was a fact especially within his knowledge. With respect that contention was rejected by me because the plaintiff should have also known when the notice to quit was served on the defendant and would have been able to prove it by calling his former solicitor, Mr. Lee Chee Ewe Pean or his clerk to give evidence as to how and when the said notice was served on the defendant. As in the case of *Lemon v. Lardeur* it was the plaintiff who has pleaded that the defendant was his tenant and that the tenancy has been determined by a notice. It was therefore for him to establish that the notice was a valid one by calling evidence to show that it was received by the defendant before the commencement of his month of tenancy and that the tenancy had been terminated according to law. But unfortunately no evidence was called by him to prove the day of the month on which the tenancy began as well as the date on which the notice to quit was actually served on the defendant. He had therefore failed to prove that the notice was valid and that the tenancy in this case had been duly determined by not less than one year's notice to quit. I therefore agreed with Counsel for the defendant that on this ground alone the appeal should be allowed.

2. Misdirections in law by the learned President, Sessions Court.

After reference to the provisions of s. 16(1)(f) of the said Act, it was the contention of Mr. Lim that the learned President had misdirected himself in law when the failed to consider the onus on the plaintiff to prove that he reasonably required the said premises **at the time of the hearing** and not in the future. He referred to *Ang Bock Seng v. Murugiah Valamball* [1970] 1 MLJ 130 and *Veeriah v. Mal Singh* [1969] 2 MLJ 93 at p. 95 and submitted that the learned President had misdirected himself in law when he found that "the plaintiff has established beyond reasonable doubt and on the preponderance of probabilities that he required possession of 224-F for his own personal occupation with the his family", because he had earlier found "as a specific fact that the plaintiff genuinely desires upon retirement to move into 224-F Burmah Road with his family". Counsel pointed out that at the date of the first hearing on 21 October 1980 and the continued hearings on 17 February 1981 and 20 March 1981 the plaintiff was still working as a Special Branch Officer and had said that he was only due to retire in January 1982. It was his submission that at the relevant times when this action was heard by the learned President the plaintiff did not reasonably require the said premises for occupation by himself with his family and that the learned President was wrong in his aforesaid finding. In other words he pointed out that the action by the plaintiff in instituting this suit in the Penang Sessions Court in 1979 to recover the said premises was premature.

It was also the submission of Counsel that the proviso to s. 16(1)(f) of the said Act required the learned President to consider the circumstances of the case at the time of the hearing and not at some future date. He pointed out that the words used were "including the question whether other accommodation is available ..." and not "will be available". He referred to page

294 of *Megarry on the Rent Acts* (10th Edn.) regarding the relevant time for the consideration of greater hardship and where the learned author had stated that "the circumstances to be considered are those existing at the time of the hearing". Mr. Lim then submitted that in considering the circumstances of the present case including the question whether other accommodation was available, the learned President had misdirected himself in considering future circumstances when he found that:

> the house in which he is now staying 224 is owned by his eldest brother and two sisters. They want to move into 224 (they had not moved in at date of trial) since the death of the husband of one of the sisters and that one of the plaintiff's brothers will ask him to move out in a year if the plaintiff could get back 224-F.

Counsel also submitted that the question to be considered by the Court was "hardship" and not "inconvenience". He referred to *Perak Hauliers Limited v. The Cycle & Carriage Co. Ltd.* [1962] MLJ 7 in which Good JA (as he then was) said:

> Secondly, the test is hardship, and not mere inconvenience *Maguire v. Steward* [1950] SLT (Sh. Ct.) 22.

and pointed out that the plaintiff had pleaded in his statement of claim and had only proved inconvenience and not hardship as at the date of hearing.

Finally, Mr. Lim conceded that an appellate Court would be slow to interfere with the decision of the trial Court on the balance of hardship which is primarily a question of fact and that to succeed an appellant must "show that the county Court Judge misdirected himself on a question of law or that he based his judgment on some finding of fact of which there was no evidence" (cf. *Perak Hauliers. Limited* case). He contended however that the learned President had misdirected himself in law in considering future circumstances and that on a proper consideration of the circumstances at the time of the trial the balance of hardship would be greater for the defendant than for the plaintiff because the plaintiff was in occupation of 224 Burmah Road and had not yet been dispossessed whereas the defendant had no other premises to move into and had not been offered any alternative accommodation.

Mr. S.C. Loh in his reply on this point submitted that there was no misdirection in law by the learned President and that he was correct in having taken into consideration the question of future hardship in arriving at his decision. He pointed out that the learned President did consider facts which were in existence at the time of hearing and contended that a Court was not prohibited from taking into consideration future hardship. He too referred to *Veeriah v. Mal Singh* and pointed out that the Federal Court in that case had in fact approved and upheld as correct the decision of the learned President of the Sessions Court, Ipoh, when he took into consideration the question of future hardship of the parties in that case.

In my judgment the learned President had not misdirected himself in considering the future circumstances when he considered the question of greater hardship. As pointed out by Mr. S.C. Loh, the learned President had also considered facts which were in existence at the time of the hearing. The Federal Court in *Veeriah's* case had referred to and approved *Sims v. Wil*son [1946] 2 All ER 261, 265 in which it was held that "a Judge was entitled to take into consideration future as well as present hardship". I was therefore not prepared to interfere with the learned President's finding on the balance of greater hardship which is a question of fact. But unfortunately he had misdirected himself in law, when considering under s. 16(1)(f) of the said Act whether the plaintiff reasonably required the said premises at the

time of the hearing in finding that the plaintiff had established that he required possession of the said premises, because, as pointed out by Mr. Lim, he had also found as a specific fact that the plaintiff would only genuinely desire to move into the said premises upon his retirement in 1982. It followed that at the time of the hearing of this suit by the learned President in the years 1980 and 1981 the plaintiff did not reasonably require the said premises for occupation by himself and his family. For this misdirection too I agreed with that the learned Counsel for the defendant that the appeal must also be allowed. In all circumstances of this case and for the reasons stated above, this appeal was therefore allowed with costs here and in the Court below.

Also found at [1984] 1 CLJ 173